Supreme Court, U.S.
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No. 09-1343

IN THE

Supreme Court of the United States

J. McINTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF FOR PETITIONER

STEVEN F. GOOBY
ROBERT A. ASSUNCAO
JAMES S. COONS
ANSA ASSUNCAO, LLP
Two Tower Center Blvd.
Suite 1600
East Brunswick, NJ 08816
(732) 993-9850

ARTHUR F. FERGENSON
Counsel of Record
ANSA ASSUNCAO, LLP
3545 Ellicott Mills Drive
Ellicott City, MD 21043
(410) 203-1247
arthur.fergenson@ansalaw.com

Attorneys for Petitioner

(Additional Counsel Listed On Inside Cover)

232640

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

544

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Attorneys for Petitioner

QUESTION PRESENTED

Does a "new reality" of "a contemporary international economy" permit a state to exercise, consonant with due process limits of the United States Constitution, *in personam* jurisdiction over a foreign manufacturer pursuant to the stream–of–commerce theory solely because the manufacturer targets the United States market for the sale of its product and the product is purchased by a forum state consumer?

LIST OF PARTIES

Petitioner J. McIntyre Machinery, Ltd. is a company organized and existing under the laws of the United Kingdom. Its principal place of business is in Nottingham, England.

Respondents Robert and Roseanne Nicastro, husband and wife, are residents of the State of New Jersey.

Defendant McIntyre Machinery America, Ltd. filed for bankruptcy in 2001, and has not participated in this action.

RULE 24.1 AND RULE 29.6 STATEMENTS

Pursuant to Supreme Court Rule 24.1, Petitioner J. McIntyre Machinery, Ltd. states that all parties to the proceeding below appear in the caption of the case on the cover page.

Pursuant to Supreme Court Rule 29.6, Petitioner is a company formed under the laws of the United Kingdom. Petitioner is not a publicly traded company and no publicly traded company owns 10% or more of Petitioner's equity.

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OPINIONS BELOW

The February 2, 2010 opinion of the Supreme Court of New Jersey is reported at *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575 (2010), and is reproduced in the Petition Appendix ("Pet. App.") at pages 1a-72a. The New Jersey Supreme Court affirmed the April 9, 2008 decision of the Superior Court of New Jersey, Appellate Division, reported at *Nicastro v. McIntyre Machinery America, Ltd.*, 399 N.J. Super. 539, 945 A.2d 92 (App. Div. 2008). Pet. App. 73a-108a. That court reversed the unpublished November 3, 2006 decision and order of the Superior Court of New Jersey, Law Division, granting Petitioner's motion to dismiss for lack of personal jurisdiction. Pet. App. 109a-137a. In its unpublished decision dated May 26, 2005, Pet. App. 154a-157a, the New Jersey Appellate Division reversed and remanded for jurisdictional discovery the March 5, 2004 decision and order of the New Jersey Superior Court, Law Division, Pet. App. 158a-172a, granting Petitioner's first motion to dismiss for lack of personal jurisdiction.

STATEMENT OF JURISDICTION

This Court's jurisdiction is appropriate under 28 U.S.C. § 1257(a). The Supreme Court of New Jersey's opinion was rendered on February 2, 2010, and the issue of personal jurisdiction over Petitioner consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution is not subject to further review in the courts of the State of New Jersey. *See Shaffer v. Heitner*, 433 U.S. 186, 195 n. 12 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485

(1975). The Petition For a Writ of Certiorari was filed on May 3, 2010, and granted on September 28, 2010.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution, Amendment XIV, Section 1, clause 3, provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This matter arises from a products liability action filed September 22, 2003, by Respondents, Robert Nicastro and his wife Roseanne in consortium, in the Superior Court of New Jersey. Respondents allege that on October 11, 2001, Mr. Nicastro was injured while using a three-ton scrap metal shear machine manufactured by Petitioner, J. McIntyre Machinery, Ltd. ("J. McIntyre") in the course of his employment with Curcio Scrap Metal, Inc. ("Curcio") in Saddle Brook, New Jersey. Joint Appendix ("JA") 5a-10a.

Mr. Nicastro received a New Jersey workers' compensation award of "nearly one-half million dollars in medical and other benefits" for his injury. Respondents' Opposition to Petition for Certiorari at 7.

The allegedly-involved shear machine was manufactured by J. McIntyre in Nottingham, England, and sold and shipped to J. McIntyre's exclusive distributor, McIntyre Machinery of America, Inc. ("MMA") in Stow, Ohio. Pet. App. 3a. In 1995, MMA sold the shear machine to Curcio and shipped it to Saddle Brook, New Jersey with an invoice that stated "F.O.B. Point Stow, OH." JA43a.

MMA was named as a defendant in this action. On or about November 29, 2001, MMA filed a Chapter 7 bankruptcy petition. JA91a. Those proceedings were closed on or about July 23, 2003, before this action was filed by Plaintiffs. JA94a. MMA is no longer operating. *Id.*

J. McIntyre is a company organized under the laws of the United Kingdom. Pet. App. 3a. Its principal place of business was in Nottingham, England. JA83a.

"J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled without any common ownership," as the New Jersey Supreme Court ruled. Pet. App. 7a. The court also held: "We do not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case." Pet. App. 14a.

On December 22, 2003, J. McIntyre answered the complaint, JA12a, and then moved to dismiss it on the basis that the New Jersey court lacked personal jurisdiction over it. JA18a. On March 5, 2004, the trial court granted J. McIntyre's motion and dismissed the

complaint, finding that J. McIntyre did not have sufficient contacts with New Jersey to justify its exercise of jurisdiction. Pet. App. 159a, 172a. The trial court held that under even the most liberal accepted application of the stream-of-commerce branch of personal jurisdiction doctrine, J. McIntyre would not be subject to jurisdiction in New Jersey. Pet. App. 170a-171a.

Respondents appealed to the Superior Court of New Jersey, Appellate Division. On May 26, 2005, the New Jersey Appellate Division opted not to decide the issue of jurisdiction, and remanded the case to the trial court for jurisdictional discovery. Pet. App. 156a-157a.

On September 11, 2006, after the completion of jurisdictional discovery, J. McIntyre again moved to dismiss the complaint for lack of personal jurisdiction. JA80a. On November 3, 2006, the trial court granted J. McIntyre's motion and again dismissed Respondents' complaint for lack of personal jurisdiction. Pet. App. 110a. The trial court ruled that J. McIntyre was not subject to personal jurisdiction in New Jersey because there was no basis to conclude that it had any expectation that one of its products would be sold and shipped to New Jersey. *Id.*

Respondents again appealed to the New Jersey Superior Court, Appellate Division. On April 9, 2008, the Appellate Division reversed the trial court's decision, holding that jurisdiction over J. McIntyre was proper under the test articulated by Associate Justice Sandra Day O'Connor in her concurring opinion in *Asahi Metal Industry Co., Ltd.. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (O'Connor, J., concurring), because:

(1) J. McIntyre does business in the United States through a single distributor; and (2) New Jersey is one of the United States and, thus, a possible location for end users of its products. J. McIntyre timely petitioned the Supreme Court of New Jersey for review by certification.

On February 2, 2010, a five-justice majority of the New Jersey Supreme Court affirmed the Appellate Division's finding of personal jurisdiction. In a decision that begins with the statement, "Today, all the world is a market," the court rejected both pluralities' treatments of the stream-of-commerce branch of personal jurisdiction doctrine in *Asahi*, and "discarded" this Court's jurisdictional jurisprudence of minimum contacts and purposeful availment as "outmoded constructs" that no longer obtained in the supposedly new world market. Pet. App. 35a.

The "new reality" discovered by the New Jersey Supreme Court that is supposedly "driven by startling advances in transportation of products and people and instantaneous dissemination of information," Pet. App. 14a-15a, was, according to the New Jersey Supreme Court, presciently anticipated by its own decision issued nearly a quarter century ago in *Charles Gendler & Co. v. Telecom Equip. Co.*, 102 N.J. 460, 508 A.2d 1127 (1986).

The New Jersey Supreme Court held that because J. McIntyre sold products in the United States generally through a single, unaffiliated distributor located in Ohio, it "targeted" the entire United States, including New Jersey. Pet. App. 39a-40a. The court

further ruled that by targeting "the United States market for the sale of its recycling products," J. McIntyre knew or reasonably should have known that this "distribution scheme" could "make its products available to New Jersey consumers." *Id.* at 40a. That is enough, held the court, to allow New Jersey courts to exercise jurisdiction over foreign defendants without violating the Due Process Clause of the United States Constitution. *Id.* at 40a-42a. In making this determination, the court cited New Jersey's "paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace." *Id.* at 34a.

The court also identified another purported interest of New Jersey. Wading into an area of national public policy, to wit, offshore outsourcing, the court stated: "It would be strange indeed if a New Jersey manufacturer that makes a defective and dangerous product . . . would be able to move its plant to a foreign land and peddle [*sic*] its wares through an independent distributor across the nation . . . and suddenly become beyond the reach of one of our injured citizens through this State's legal system." *Id.* at 35a.

Continuing its foray into considerations of our proper relations with other countries, the court opined: "It would be unreasonable to expect that plaintiff's only form of relief is to be found in the courts of the United Kingdom, which may not have the same protections provided by this State's product-liability law." *Id.* at 41a-42a. Targeting for special concern the "globalization of commerce" and the actions of foreign manufacturers marketing "their products through distribution systems

that bring those products into this State," the court announced in language suggesting trade restrictions on the international business community, that this "privilege" comes with an attorning to the power of New Jersey courts. *Id.* at 42a. The case was remanded to the trial court for further proceedings. *Id.* at 43a.

On April 22, 2009, J. McIntyre filed for Administration in the United Kingdom under the Insolvency Act 1986 and is presently in liquidation proceedings. Though Respondents and the New Jersey Supreme Court had previously decried the notion of having to seek redress against J. McIntyre in the United Kingdom, Respondents have filed proofs of unliquidated monetary claims in those very proceedings. *See* Respondent's Opposition to Petition for Certiorari at 6. Respondents' claims against J. McIntyre in the United Kingdom remain pending, and dissolution of the company has not yet occurred.

SUMMARY OF THE ARGUMENT

In a rejection of this Court's jurisprudence as consisting of "outmoded constructs of jurisdiction," the Supreme Court of New Jersey held that, in light of a purported "radical transformation of today's global market," a producer anywhere in the world is now subject to *in personam* jurisdiction in a products liability action in New Jersey state court under the stream-of-commerce branch of the personal jurisdiction doctrine if that defendant targets the United States "market" for the sale of its products and just one is purchased by a New Jersey consumer. Pet. App. 35a.

In *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), this Court, in separate pluralities considering the application of the stream-of-commerce branch of *in personam* jurisdiction, kept the constitutional touchstone of requiring a defendant to have minimum contacts with a forum state, whether through conduct directed at the forum state or actual awareness of a distribution system that brings its products into the forum state's territory, before a court may exercise jurisdiction over the defendant.

The New Jersey Supreme Court disregarded *Asahi* and its obligation under the Constitution to apply the jurisdictional rules established by this Court. The New Jersey Supreme Court's decision to "discard" this Court's jurisprudence cannot be justified under the Supremacy Clause, U.S. Const., Art. VI, Sec. 1, cl. 2, and Article III of the Constitution; nor can that court's new rule be squared with a foreign defendant's due process rights under the Constitution. Both of these constitutional errors can be traced to a common root: a failure to appreciate the limits on the role of the states in our federal system.

Even as courts in the early years of our Nation under the Constitution struggled with the deference that one state owed to another under the Full Faith and Credit Clause, U.S. Const., Art. IV, Sec. 1, it was recognized that a rendering state court's adjudicative authority was constrained to its territorial jurisdiction. This Court has located the right of a putative defendant to be free from the illegitimate exercise of state court power in the Due Process Clause of the Fourteenth Amendment, grounding it in territorial limits. Territorial

jurisdiction allows the various states to enforce their laws without reaching beyond the limits imposed on them as coequal sovereigns in the federal system. It also assures that nonresidents are given fair notice of what is required of them to be free from the unfair assertion of judicial authority. This restriction on state sovereign power is a function of individual liberty protected by the Due Process Clause.

This Court no longer requires that a person be "present" for the exercise of state court jurisdiction. Yet, this Court's jurisprudence can be understood as the search for an appropriate surrogate for presence, one that can define the due process boundaries of a state's legitimate exercise of sovereignty over a person beyond its borders.

The minimum contacts test serves that purpose. As developed by this Court from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to the present, the test includes a requirement that the person over which a state seeks to exercise sovereignty has taken a deliberate and concrete act directed to the forum state that creates a substantial connection with that state.

The New Jersey Supreme Court refused to apply the jurisprudence of this Court so that it could provide a New Jersey forum for every New Jerseyan injured by a product sold there, whatever the cost to the United States Constitution and to the conduct of foreign relations by the federal government. It saw fit to make irrelevant minimum contacts; this Court has never done so. The New Jersey Supreme Court went so far as to eliminate from its jurisdictional calculus any need for

the putative defendant to be aware of the forum state, something this Court has never even considered. Under the concurring opinions in *Asahi* of both Justice O'Connor and Associate Justice William J. Brennan, Jr., minimum contacts must exist for a state court to exercise *in personam* jurisdiction over a putative defendant who is a nonresident of the state. Because, as found by the New Jersey Supreme Court, Petitioner had no minimum contacts with New Jersey, the judgment is inconsistent with the Constitution.

The New Jersey Supreme Court offered policy reasons to support its decision to adopt an entirely new jurisprudence for personal jurisdiction. Each is irrelevant: absent minimum contacts, there is no jurisdiction.

The "new realities" of global commerce that the New Jersey Supreme Court discovered not only do not support the new rule it adopted, but those so-called realities would have existed nearly a quarter-century ago at the time *Asahi* was decided. Further, global commerce as it is now conducted argues against the adoption of the New Jersey Supreme Court's holding. Global commerce depends upon comity among sovereign states and the web of bilateral and multi-lateral arrangements that has been spun during the post-World War II period. The New Jersey Supreme Court has determined to solve what it considers to be the unfairness of global trade by requiring every foreign company whose goods are sold into New Jersey to be held accountable to a New Jersey court even though a foreign court would be available because it would be "unreasonable" to reach any other result. That is not the business of New Jersey; it is the business of the United States.

The explication by Justice O'Connor in her concurring opinion in *Asahi* is consistent with this Court's jurisprudence. That jurisprudence requires that before *in personam* jurisdiction attaches, the nonresident putative defendant must purposefully establish by its own actions minimum contacts in the forum state; mere thought is insufficient. Justice Brennan's concurrence employs this Court's case law much more sparingly and departs from the plain meaning of the language adopted by this Court.

Justice Brennan's thought-based test also does not adequately protect the fair notice interests of an economic actor and its right to conform its actions to avoid a state's exercise of jurisdiction. Justice O'Connor's restatement of the principles that form the rule of law set forth by this Court does provide certainty. Over the years, and in application by lower courts, this Court's traditional jurisprudence in this area has proven remarkably supple in responding to changing economic circumstances. There is no reason to discard that jurisprudence based upon a transformation of global commerce that occurred decades ago.

Other state courts have seen an opening by means of Justice Brennan's concurring opinion to find constructive knowledge where actual knowledge did not exist. This Court can re-affirm the rule of minimum contacts, setting forth a jurisdictional rule that in itself ensures fair play and substantial justice, without the need for a bifurcated test that relies on the subjective assessment by individual judges, and thereby preserve the rights of putative defendants and place appropriate constraints on the power of the individual states.

Here, because the New Jersey Supreme Court held that Petitioner lacked minimum contacts, the judgment should be reversed.

ARGUMENT

I. THE NEW JERSEY SUPREME COURT LACKS THE POWER TO DISCARD THIS COURT'S JURISDICTION JURISPRUDENCE.

The decision below admits of many defects, not least of which is its exercise of a supposed power to "discard" this Court's jurisdiction jurisprudence as "outmoded." The New Jersey Supreme Court demonstrated thereby its contempt for the founding principle that this Court is the ultimate source for the meaning of the United States Constitution and that state courts and federal courts are bound by those rulings. *See Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). The court held that it had jurisdiction over a defendant that lacked minimum contacts with New Jersey, even though minimum contacts have been at the core of this Court's jurisprudence for 65 years, from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), through and including both pluralities in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987).

Once the New Jersey Supreme Court concluded, correctly, that no minimum contacts existed, it was bound under the Constitution to affirm the trial court's determination that New Jersey cannot exercise *in personam* jurisdiction and let J. McIntyre return home to England. Instead, by opting to exercise jurisdiction, the court not only violated its duty under the

Constitution to follow this Court's decisions, but the new rule it announced—jurisdiction obtains when a person targets the United States and a New Jersey consumer purchases a product—does violence to the jurisprudence that this Court has developed over the past 160 years, starting no later than this Court's opinion in *Pennoyer v. Neff*, 95 U.S. 714 (1850).

II. A STATE'S AUTHORITY TO EXERCISE JURISDICTION IS INEXTRICABLY BOUND TO ITS TERRITORY.

The New Jersey Supreme Court grounded New Jersey's power to act, not on any contact by a defendant with New Jersey, but rather on entry by a defendant into the territory of the United States. Sovereignty was thereby extended by New Jersey over an area that it does not and cannot control. Just as New Jersey's Supreme Court is not the Supreme Court of the United States, so, too, its demesne is not the United States.

A. The First, and Enduring, Principle of State *In Personam* Jurisdiction: Territory.

The proposition that a court lacking personal jurisdiction over a defendant may not render a valid judgment against that defendant traces back to long-standing English and American legal conventions that both precede and find eventual embodiment in the Fourteenth Amendment. *See Burnham v. Superior Court of California*, 495 U.S. 604, 608-609 (1990) (Scalia, J., concurring); *see also Bissell v. Briggs*, 9 Mass. 462, 467 (1813); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting).

Early in our history as a Nation, courts recognized that the nature of the states within a system of dual sovereignty created biases in favor of in-state litigants. Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 297 (1990) (discussing Justice Story's opinion in *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134)); *cf. Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (considering the legislative jurisdiction of Texas to affect a contract entered into and performance contemplated entirely in Mexico). Justice Story's formulation of territoriality in *Picquet* was "a means to prevent states from overstepping their bounds in a federal union." Kogan, *supra*, at 297. An acceptance of sovereign power and territoriality is, and always has been, essential to a state's assertion of personal jurisdiction over a defendant. *Burnham*, 495 U.S. at 608-11 (Scalia, J., concurring). Since the inception of our federalist system, the sovereignty of each state has effected a concomitant limitation on the sovereignty of all sister states, a limitation that this Court has located in the Constitution both before and after the Fourteenth Amendment was added. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

In *Pennoyer v. Neff*, 95 U.S. 714 (1877), this Court first evaluated personal jurisdiction under the Fourteenth Amendment's Due Process Clause. Recognizing that "the authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," *id.* at 720, this Court held that personal jurisdiction may be exerted over a party only if that party is served with process while physically within the territory of a state, and that the

judgment of a court lacking personal jurisdiction over a defendant violated the Due Process Clause. *Id.* at 733. This Court defined due process to mean "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Id.* In this Court's jurisprudence, the continuing importance of *Pennoyer* "is not its result, but the fact that its principles and corollaries derived from them became the basic elements of the constitutional doctrine governing state court jurisdiction." *Shaffer v. Heitner*, 433 U.S. 186, 198-99 (1977).

B. The Minimum Contacts Test Allowed States to Exercise Adjudicative Jurisdiction Beyond their Geographic Boundaries Even as It Preserved the Territorial Limitation.

Responding to an increasingly interconnected system of trade, communication and travel in the last century and through the present, this Court deviated from strict geography in *Pennoyer*, but only with respect to suits arising from a putative defendant's intentional contacts with a state that establish thereby a substantial connection. *Burnham*, 495 U.S. at 610 (Scalia, J., concurring).

The "minimum contacts" test was first announced in *International Shoe Co.*, 326 U.S. at 316. In *International Shoe Co.*, this Court held that the courts of a state may exercise personal jurisdiction over a nonresident defendant consistent with the Due Process Clause of the Fourteenth Amendment only if the

defendant has "certain minimum contacts with the [forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *McGee v. International Life Insurance*, 355 U.S. 220, 222-23 (1957).

The Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.* at 319. Rather, there must be a showing of a voluntary, substantive connection by the foreign defendant with the state, such that the foreign defendant deliberately chose to take advantage of the "benefits and protection of the laws" of the forum state, before it can fairly be haled into court there. *Id.* In considering a forum's exercise of personal jurisdiction over a foreign defendant, "[t]he relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there,'" *World-Wide Volkswagen*, 444 U.S. at 292 (*quoting International Shoe Co.*, 326 U.S. at 316).

While allowing for jurisdiction to be based on factors other than mere presence, this Court emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of government" and that the Due Process Clause ensures not only fairness but also the "orderly administration of the laws." *International Shoe Co.*, 326 U.S. at 317, 319.

Those minimum contacts, which this Court found in *International Shoe* to be essential to create jurisdiction beyond mere physical presence in the forum state, are tied to the state's territoriality through the requirement that "there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (emphasis added); *see also Asahi*, 480 U.S. at 109 (O'Connor, J., concurring); *Burger King Corp.*, 471 U.S. at 473. "[T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum state." *Id.* at 474. When a connection with the forum state is merely "'random,' 'fortuitous,' or 'attenuated,'" there can be no purposeful availment, and jurisdiction cannot rest against a defendant based on the "'unilateral activity of another party or third person.'" *Id.* at 475; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Without purposeful availment, there cannot be a finding of personal jurisdiction. *Hanson*, 357 U.S. at 253. The Constitution protects a putative defendant against a state's exercise of judicial power where that person has no purposeful and substantial connection with that state.

C. The Obligation that a Putative Defendant Engage in "Purposeful Availment" Ensures the Fair Warning Compelled by Due Process: Territoriality Protects Fairness.

As a means of establishing notice of the prospect of suit, a defendant's purposeful connection with a forum state is an utterly appropriate surrogate for its presence

within the state's territory. Nonresident defendants are entitled to "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King Corp.*, 471 U.S. at 472 (quoting *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring in judgment)). The fair warning "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). This predictability then allows entities doing business within our country's borders, be they foreign or domestic, to have true—as opposed to imputed or constructive—awareness of the possible risks their primary conduct will entail, and to manage those risks accordingly. Where jurisdiction is based upon the defendant's own forum-directed conduct, the "fair notice" requirement is satisfied and, in the truest sense, a lawsuit in the forum cannot be unexpected. *See Id.*

Purposeful availment provides a guarantee that a putative defendant will have notice of the risk of suit in a particular forum, and fulfills the values that this Court's jurisdictional jurisprudence has identified to protect participants in our national economic life against the unconstitutional reach of a state's sovereignty.

As a consequence of the global trade that the New Jersey Supreme Court so avidly cites (yet does not grasp, *see* Section IV, *infra*), foreign entities that would seek to do business in the United States include economic actors of all sizes and juridical shapes. All are entitled to trade with the United States without being

dragged into New Jersey courts in derogation of our Constitution and New Jersey's proper role in our federal system.

The importance of fair notice to foreign putative defendants arises in part from the freedom of each state to establish through the will of its citizens bodies of law to operate within its territory. Each state's legal system is endowed with the basic power to apply the law that will govern civil disputes within its territorial boundaries, subject to the Constitution, federal law, and treaties. 28 U.S.C. §1652. The laws of the several states are largely "non-uniform." John S. Baker, Jr., *Respecting A State's Tort Law, While Confining Its Reach To That State,* 31 Seton Hall L. Rev. 698, 704 (2001). Substantive laws, policies, procedural rules, and the very makeup of the judicial organs enforcing those laws, policies, and rules can vary dramatically from state to state, particularly in the context of product liability claims, the subject matter of the instant case.

Certain states pose a greater challenge, and thus, a greater risk of loss, to product manufacturer defendants sued for product liability. For example, New Jersey's highest court holds that a product defendant may not introduce evidence of a plaintiff's comparative fault in workplace accidents, s*ee Suter v. San Angelo,* 81 N.J. 150, 406 A.2d 140 (1979), whereas in North Carolina contributory negligence is a complete bar to a third-party products liability action by an injured worker. *See* N.C. Gen. Stat §§ 99B-4(2) to (3) (1995); *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 488 S.E.2d 240 (1997). Colorado, Connecticut, and Tennessee, among others, have enacted statutes of

repose for product defect claims, Colo. Rev. Stat. Ann. § 13-80-107(1)(b)(2005); Conn. Gen. Stat. Ann. § 52-577a (2005); Tenn. Code Ann. § 29-28-103 (1993), while California, New York, and others have none. Certain other states' laws pose lesser, or more manageable, risks for product manufacturer defendants. Michigan, which does not recognize strict liability in product defect claims, has enacted caps on noneconomic damages in product liability cases, as has Ohio. *See* Mich. Comp. Laws § 600.2946a(1) (2000); Ohio Rev. Code Ann. § 2315.18 (2004).

Monetary threshold for availability of jury trials varies from state to state, each state adopts its own choice-of-law rules, and judges are elected in some states, and appointed in others. Finally, there are jurisdictions whose judicial operations themselves pose a potential risk. These risks have been subject to analysis by various organizations and the right to know and plan as captured by this Court's *in personam* jurisprudence certainly embraces these risks as well. Stephen J. Choi et al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 Duke L. J. 1313 (2009); American Tort Reform Association, "Judicial Hellholes, 2009," Atra.org, *www.atra.org/reports/hellholes/*; U.S. Chamber of Commerce, "Lawsuit Climate, 2010," InstituteForLegal Reform.com, *http://www.instituteforlegalreform.com/lawsuit-climate.html#/2010*.

Purposeful availment provides economic actors in American markets with the fair notice that is required to meaningfully appreciate these differences, and the risks they carry. A jurisdictional rule that places no

importance on fair warning, and thus makes no allowance for predictability, deprives a defendant of the ability to adjust its primary conduct and govern its affairs vis-à-vis the forum so as "to alleviate the risk of burdensome litigation." *See Burger King*, 471 U.S. at 476 n. 18.

D. Consistent with the Minimum Contacts Test, this Court's Stream-of-Commerce Jurisprudence Requires Purposeful Conduct Directed Toward the Forum: Territoriality Obtains.

This Court first articulated the stream-of-commerce branch of personal jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). In *World-Wide Volkswagen*, the issue presented was whether an Oklahoma court could exercise personal jurisdiction over an automobile retailer and wholesaler, both New York corporations, in a product liability action. *Id.* at 288-289. The defendants' only contact with Oklahoma was through the sale of a car to a nonresident consumer in New York, who then drove the car to Oklahoma where the subject accident occurred. *Id.* This Court found no "efforts [by defendants] to serve, directly or indirectly, the market for its product in [Oklahoma]," *id.* at 297, and held that defendants could not be subjected to personal jurisdiction where their alleged contacts with the forum state were based on the unilateral act of the consumer and not on any act of their own. *Id.* at 298.

The plaintiffs argued that "because an automobile is mobile by its very design and purpose it was 'foreseeable' that the [subject automobile] would cause injury in Oklahoma." *Id.* at 295. This Court rejected that argument, and responded that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* "The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that *the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.*" *Id.* at 297 (emphasis added). If such a connection can be found, "a forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98.

Jurisdiction could not be based solely upon the foreseeable unilateral actions of a consumer, but rather, must rest on the quality of the defendant's activities directed toward the forum state, such that a reasonable expectation of a lawsuit in that state could not come as a surprise. *Id.* The proper focus is on the defendant's behavior, not its chattel's course, or the plaintiff's hardship.

The putative defendant's conduct directed to and the resulting connection with the forum state renders assertion of jurisdiction just and fair. Fairness and federalism are comprehended in a single standard, one tied to the territorial interests of a state to enforce its laws particular to it with procedures deemed best to protect and implement those laws.

This Court again considered the stream-of-commerce branch of personal jurisdiction in *Asahi*. There the injured plaintiff alleged that a motorcycle tire, tube and sealant were defective resulting in an accident. 480 U.S. at 105-06. Plaintiff sued the Taiwanese manufacturer of the tube in California state court, which in turn filed a cross-complaint for indemnification from Asahi Metal Industry Co., the Japanese component manufacturer of the tube's valve assembly. *Id.* at 107. Asahi had no offices, property, or agents in the forum state, solicited no business and made no direct sales in the state, and did not design or control the system of distribution that brought its product into the forum state. *Id.* at 108. Asahi challenged personal jurisdiction.

This Court held that the state court could not constitutionally exercise jurisdiction over Asahi. The Court divided into two principal plurality opinions, each joined in by four Justices. Although the two pluralities agreed with the result, they differed on how to arrive at it.

Justice O'Connor, writing for a plurality, was of the view that ". . . a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112 (O'Connor, J., concurring). "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* Purposefully directed conduct of the defendant could include designing a product particularly for the forum state, advertising in the forum state, establishing service channels for customers in the state,

to assume that this trend [favoring minimum contacts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson*, 357 U.S. at 251. That is as true today as it was when this Court so stated in 1958.

The most instructive of the post-*Asahi* literature on personal jurisdiction can be found, not in the law reviews, but in the case law, as state and federal courts grapple with this Court's personal jurisdiction jurisprudence. At its best, this ongoing exercise in constitutional exegesis captures the essence of what this Court has been doing and saying over the years.

A singularly persuasive and comprehensive effort is the opinion of the Fourth Circuit in *Lesnick v. Hollingsworth & Vose Co.*, 35 F. 3d 939 (4th Cir. 1994), as written by Circuit Judge Paul V. Niemeyer, joined in by Circuit Judge Francis D. Murnaghan, Jr. and District Court Judge Claude M. Hilton of the Eastern District of Virginia (sitting by designation). That court identified "the establishment of a surrogate for presence [as] the core task in defining due process boundaries of a state's legitimate exercise of sovereignty over a person beyond its borders." *Id.* at 941. Through this quintessentially common law process of accretion—as opposed to the New Jersey Supreme Court's avulsion in this case—the territorial source of state power continues to order the principles of personal jurisdiction, even as those principles have evolved in their elucidation by this Court over time. *See id.* at 943.

Through its analysis of this Court's opinions over the years, the Fourth Circuit found continuity through and including *Asahi*. The coherence is given by territoriality: "The touchstone of the minimum contacts analysis remains that an out-of-state person have engaged in some activity purposefully directed toward the forum state." *Id.* at 945.

As viewed through the reconciling lens of time, this Court has integrated the changes in our world into the jurisdictional principles found in our Constitution. The accommodative power of this Court's jurisdictional doctrine was aptly described by the Seventh Circuit in *Jennings v. AC Hydraulic A/S*, 383 F.3d 546 (7th Cir. 2004): "[A]lthough technological advances may alter the analysis of personal jurisdiction, those advances may not eviscerate the constitutional limits on a state's power to exercise jurisdiction over nonresident defendants." 383 F.3d at 550 (*citing Hanson*, 357 U.S. at 250-51).

III. THE NEW JERSEY SUPREME COURT'S DECISION IS FUNDAMENTALLY AT ODDS WITH THE PROTECTIONS GRANTED PUTATIVE DEFENDANTS BY THE CONSTITUTION.

The holding of the New Jersey Supreme Court is as simple as it is stark: a foreign manufacturer that markets to the United States may be haled into a New Jersey court on a product liability claim as long as the product was purchased by a New Jersey consumer. A plaintiff no longer has to demonstrate that the defendant thought about New Jersey or even knew that it exists.

The limitless assertion of worldwide jurisdiction by the court, without even a by-your-leave to this Court's jurisprudence, violates the Constitution and is unsupported by the smorgasbord of quasi-legislative "policies" the court announced. Further, the leitmotif of the opinion—that the New Jersey Supreme Court is compelled to adopt a radical transformation of the law by the "modern truths" of a rapidly changing world economy—is nothing more than an excuse for judicial exceptionalism. The court does not respect globalization but is fighting against it: erecting a trade barrier against the very globalization it claims justifies its acting to discard what it described as this Court's "outmoded constructs of jurisdiction."

A. The New Jersey Supreme Court's Ruling Violates the Constitution as Interpreted by this Court.

Both of the competing pluralities in *Asahi* required that, before state long-arm jurisdiction could attach pursuant to the stream-of-commerce branch of *in personam* jurisdiction, the forum state be in the sights of the putative defendant, either by an act purposely directed to the state (for Justice O'Connor, *Asahi*, 480 U.S. at 112), or by awareness that the final product is being sold in the forum state (for Justice Brennan, *id.* at 117). The New Jersey Supreme Court found that only the United States was in Petitioner's sights, which was enough for that court, but not for the Constitution. Pet. App. 31a. No jurisdictional evidence was presented that J. McIntyre had ever taken the slightest purposeful act toward New Jersey or even considered New Jersey as a possible sales locale for any machine, much less the

one that wound up as the subject matter of the instant action: "J. McIntyre may not have known the precise destination of a purchased machine, but it clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States." Pet. App. 39a-40a.

B. The New Jersey Supreme Court's Ruling Destroys the Notion of Individual Sovereignties Inherent in Our System of Federalism.

New Jersey's elimination of the constitutional right of due process in personal jurisdiction was anticipated and named for what it is over 16 years ago by the Fourth Circuit: an assault on the Constitution and the liberty to be free from the baseless exercise of jurisdiction by a state. *Lesnick*, 35 F.3d at 945. The Fourth Circuit analyzed a proposed rule that was identical to that adopted by the New Jersey Supreme Court in this case: "To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism." *Id.* Identifying the essential flaws of the rule now adopted by the New Jersey Supreme Court, the Fourth Circuit held that such a rule, by eliminating the need for deliberate conduct by defendants, would "mak[e] it impossible for defendants to plan and structure their business contacts and risks." *Id.* The Fourth Circuit understood the fundamental unfairness that arises from a rule failing to ground jurisdiction, under any branch of the doctrine, in a putative defendant's purposeful creation of a substantial connection to the forum state. Requiring a substantial

connection to the forum "'protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he established no meaningful 'contacts, ties or relations.'" *Burger King Corp.*, 471 U.S. at 471-72 (quoting *International Shoe*, 326 U.S. at 319).

C. The Rationales Advanced by the New Jersey Supreme Court Are as Irrelevant as They Are Unavailing.

The New Jersey Supreme Court sprinkled a host of collateral factors throughout its opinion seeking to justify its determination to discard this Court's jurisprudence: New Jersey's interest in protecting its citizens from allegedly defective products; the illogic of allowing a forum to be defeated by hypothetical outsourcing to other countries; the new world of commerce; the unreasonableness of depriving plaintiff of a New Jersey forum when the alternative is the courts of the United Kingdom; and the ease in an age of modern travel for the defendant to find its way to New Jersey because it had found its way to other places in the United States.

First, each is irrelevant. The relevant constitutional inquiry is not whether the Mr. Nicastro was hurt or whether the practical burden on J. McIntyre in litigating the claim in New Jersey is relatively slight. The sole concern is whether J. McIntyre had minimum contacts with New Jersey. Absent the required minimum contacts, there can be no finding of personal jurisdiction. "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a *prerequisite* to its exercise of power over him."

Hanson, 357 U.S. at 251 (emphasis supplied). Whatever the source of felt need, however deep the sense of injustice at a tragic situation, a state sovereign whose boundaries have not been transgressed by a purposeful act that thereby created a substantial connection between the alleged wrongdoer and that state, is forbidden by the Constitution from exercising any adjudicative authority over that person.

Second, without identifying any supporting legal authority, the New Jersey Supreme Court stated: "It would be unreasonable to expect that plaintiff's only form of relief is to be found in the courts of the United Kingdom," giving as its only reason the possibility that the United Kingdom "may not have the same protections provided by this State's product-liability law." Pet. App. 41a-42a. This is a non sequitur. That the law of the United Kingdom is different than that of New Jersey has no logical relation to minimum contacts.

Third, despite the stated importance to the New Jersey Supreme Court's holding, the judicially-noticed theme of the "global marketplace" was not explored or explained, much less given the heft of any evidentiary support. This theme requires a belief that the current status of international trade is such that large industrial machinery now flows more quickly and readily through new, previously un-realized channels. In the real world products small and large, including heavy machinery such as the shear machine at issue (manufactured and sold 15 years ago), travel across borders as they always have: they are shipped. While the United States is certainly part of an international economy, the basic methods of selling and transporting goods are the same as they were in the time of *Asahi*. The belief that a

"radical transformation of the international economy," Pet. App. at 35a, somehow effects a profound change in the nature of product transportation and distribution is wrong and offers no basis to reject this Court's *in personam* jurisdiction jurisprudence.

The modern economy has always been marked by the existence of global trade, and foreign manufacturers have been doing business in the United States since the 19th century. Commentators, including those cited by the New Jersey Supreme Court and Respondents in the proceedings below, describe the movement as occurring over the last 200 years, not the last 20. *See* Friedman, *The World Is Flat*, 9-10, Farrar, Straus and Giroux, 2006; Licht, *Industrializing America: The Nineteenth Century* 133 (1995). The extent of what is considered "global" trade can and should be compared to the levels of locally-based economic activity which, other commentators have determined, far exceeds the level of what happens in a so-called "flattened" world. *See* Ghemawat, *Why the World Isn't Flat*, Foreign Policy, February 14, 2007 (determining that over 90 % of all phone calls, internet web traffic, and investment is local). It is a flawed notion to rest the elimination of an entire jurisprudence upon such an undefined premise as the advent of "global trade."

Society's collective ability to communicate and transfer information through electronic means may have accelerated in recent years, and tangible consumer goods can often be ordered more rapidly, but the conduits through which goods travel are essentially no different than they were 50 years ago. This is best illustrated by the case at hand. The three-ton shear

machine at issue was ordered and transported overland from MMA's Ohio location to Curcio Scrap Metal in New Jersey. Today, as in yesteryear, products are delivered to their final destinations by air, sea, rail, or road.

To pretend that this case exemplifies some unprecedented tide of foreign products infiltrating New Jersey without quarter, such that its courts must abandon purposeful availment and constitutional due process, ignores that New Jersey has always been a portal state. International trade, such as it is, has long figured prominently in state and national economies.

The development of the global marketplace dictates an ever more vigorous enforcement of this Court's minimum contacts/purposeful availment jurisprudence. In this modern era of free trade, our country's multi- and bi-lateral agreements among nations rest with the constitutional competence of the federal sovereign. New Jersey courts have no business taking steps to mitigate any perceived unfairness of free trade or the freer flow of goods across national borders. The irony of the New Jersey Supreme Court's decision is that the very changes in the world economy it cited argue against the result reached. If New Jersey's citizens have been placed at risk by the flow of dangerous products from abroad, then all Americans have, and the remedy rests with the United States and its regulation of international trade.

D. A "Purposeful *Non*-Availment" Test Finds No Home in Logic or this Court's Jurisprudence.

The New Jersey Supreme Court states: "A manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products into this State." Pet. App. 36a. That statement makes no sense in the context of the new rule the court adopted, which permits the exercise of jurisdiction over a foreign manufacturer that has never marketed into New Jersey. Perhaps this statement means that a foreign manufacturer must ensure that none of its products are ever sold to a New Jersey consumer by anyone. But in order to keep out of New Jersey, a foreign producer would have to become entangled with it. Although the court does not describe what "makes clear" may mean, this language suggests the obligation to take affirmative steps to keep products out of New Jersey, which may mean that foreign companies will have to audit the books of its distributors, issue proclamations not to sell its products into New Jersey, and be subject to the hindsight scrutiny of the New Jersey courts in litigating, as a preliminary jurisdictional issue, whether it exercised adequate diligence in keeping away from the state.

This "purposeful non-availment" test, for want of a better term, turns this Court's jurisprudence on its head. This Court requires that a putative defendant create a substantial connection to the forum state before jurisdiction can attach. The very term "purposeful" requires conduct. Even the language from *World-Wide Volkswagen* the New Jersey Supreme Court block quotes in its decision, states that a putative defendant

can avoid the risk of burdensome litigation by "severing its connection with the State." Pet. App. 19a. All that matters is "its" connection with the state, not another's.

Such an obligation to draw up and enforce a "blacklist" of states cannot be a reasonable construction of *World-Wide Volkswagen* or a helpful exercise in any respect. It would also run afoul of this Court's admonishment in *Hertz Corp. v. Friend*, 509 U.S.__, 130 S. Ct. 1181, 1193 (2010), against the use of "complex jurisdictional tests" that "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims . . .."

New Jersey has redefined due process to mean that a defendant must modify someone else's behavior, not, as this Court requires, the defendant's own behavior. *See World-Wide Volkswagen*, 444 U.S. 297. Such a redefinition creates unnecessary difficulties in application, even as it violates this Court's jurisprudence.

IV. THE NEW JERSEY SUPREME COURT DOES NOT UNDERSTAND THE VERY MODERN ECONOMY TO WHICH IT PURPORTS TO RESPOND.

In the course of discarding an entire jurisprudence, the New Jersey Supreme Court claimed to fashion a rule of personal jurisdiction that "reflect[s] modern truths" and takes into account the new realities of international trade. Pet. App. 35a. The court has done nothing of the sort; it has articulated little more than a parochial,

outdated protectionism that seeks to solve what it sees as problems of modern trade by erecting what amounts to a new international trade barrier. This is not New Jersey's business; it is the Nation's business, and the proper loci for addressing issues related to the globalization of trade are Congress and the Executive.

The impact on trade of the New Jersey Supreme Court's decision is potentially catastrophic. Now any person in the world making products that are purchased by a New Jersey consumer may be forced to defend a lawsuit in New Jersey, a place the person may never have heard of. Nor will this stop at New Jersey. As Petitioners in the tandem case of *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76, state in their Petition For a Writ of Certiorari at 17: "well over half the states have long-arm statutes authorizing the exercise of jurisdiction to the full extent permitted by due process." If the New Jersey Supreme Court's ruling is correct, without the need of any change in governing statutes producers large and small from around the world will be haled into state courts without having done anything to associate themselves with any of those states. Nor is it likely that those states without the longest of long arm statutes will refrain from reaping this bonanza for their residents and lawyers.

The New Jersey Supreme Court's determination to broadly and unilaterally increase the scope of its jurisdictional exercise over foreign manufacturers appears to be animated by several concerns, including a belief that hypothetical offshore outsourcings might create a "strange indeed" situation, one to which the court gives no factual content. Pet. App. 35a. Of

seemingly greater concern to the court in formulating its new rule—to every injury there is a state to sue in—is the fear that a foreign producer of goods could be immune from suit in every state, even though the producer would be amenable to suit in another country. Pet. 32a, 41a-42a. The New Jersey Supreme Court found jurisdiction unavailing in a nation—the United Kingdom—whose courts are trusted, fair, competent, and as free from the stain of corruption or undue influence as any judicial system in the world, including that of the United States.

Such parochialism threatens our relationship with other countries and their judicial systems. "The reluctance of other nations to recognize U.S. judgments is inextricably tied to how U.S. courts exercise personal jurisdiction." Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 51 (2006). Multiplying the problem that New Jersey presents by this case to include all the states that adopt a constitutionally-maximum approach to long-arm jurisdiction could create a nightmare, for this country and for all our courts that depend upon the comity of the courts of other nations to respect and enforce our judgments.

Whether it is preferable to have a state court forum for a claim against every foreign producer of every good that allegedly causes injury, is not for a state to determine. It may or may not even be a problem. *See, e.g.*, *Mullins v. Harley-Davidson Yamaha BMW of Memphis, Inc.*, 924 S.W.2d 907, 912 (Tenn. Ct. App. 1996). The authority to deal with these issues rests with

the United States, not New Jersey. A bill is now pending in Congress that seeks to address this issue by requiring certain foreign manufacturers, as a condition to selling products in the United States, to pick a state in which it will be subject to consensual jurisdiction. *See* H.R. 4678, 111th Cong. (2010). That legislation, if enacted, will require foreign manufacturers to register with the appropriate regulatory agency and to establish a registered agent authorized to accept service of process on their behalf for the purpose of all civil and regulatory actions in state and federal courts in a state with a substantial connection to the importation, distribution, or sale of the products.

In sum, the New Jersey Supreme Court has failed to heed this Court's admonition in *Asahi*, 480 U.S. at 115, when it quoted *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting): "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

The New Jersey Supreme Court's new rule also threatens trade within our borders. Please consider the following hypothetical: A candle maker in Alaska starts a small candle business in Anchorage. His candles are large and can be used in most homes anywhere. He has no developed marketing or sales plan as of yet, but is interested in selling as many candles as he can. His friend in Seattle, Washington has a gift store and they have agreed to an arrangement in which the friend will sell the candle maker's products in Seattle. A New Jersey man vacations in Seattle, visits the shop and orders one of the larger candles, which the shopkeeper

agrees to ship to his home in New Jersey. The Alaskan candle maker is never informed of this sale. The day the candle arrives, the New Jersey man opens the package and lights the candle. A short time later, the candle improperly melts and a fire starts, consuming the house and injuring the man's family. The New Jersey man sues the candle maker for damages in his state court alleging product defect. Though the candle maker had no connection to New Jersey and he exhibited no intention, actions, or awareness that his product should or would be sold and shipped to someone there, under the New Jersey Supreme Court's holding the candle maker is nevertheless amenable to jurisdiction and is now forced to defend the lawsuit in New Jersey. That result violates the Alaskan candle maker's due process rights guaranteed by the Constitution no less than it does those of Petitioner and for the same reasons, and wrongly interferes with the operation of the common market that operates within our Union.

V. THE ELUCIDATION BY JUSTICE O'CONNOR IN *ASAHI* BEST COMPORTS WITH THIS COURT'S JURISDICTIONAL JURISPRUDENCE AND PROTECTS AGAINST OVER-REACHING BY LOWER COURTS.

For the past nearly-quarter century, the law of *in personam* long-arm jurisdiction pursuant to its stream-of-commerce branch has remained open to mis-interpretation even as the underlying doctrine of adjudicative jurisdiction has not changed. The lower courts have been provided with two competing plurality opinions in *Asahi*, which take very different views of the constitutional limitations on a state's exercise of jurisdiction over foreign putative defendants.

The analysis of Justice O'Connor's concurring opinion better comports with this Court's jurisprudence in at least two respects. First, it embodies the requirement of active engagement, of personal agency, that this Court has made the centerpiece of its formulations of personal jurisdiction limits under the Constitution. Second, it avoids the subjectivity that inheres in the test of mere awareness advanced by Justice Brennan. The concreteness of Justice O'Connor's formulation is especially valuable in giving out-of-state actors the fair notice that this Court has deemed essential in allowing persons to conform their behavior to avoid, if they choose, the possibility of being haled into the courts of a state. By locating a foreign putative defendant's right not to be improperly dragged into a state in the Due Process Clause of the Fourteenth Amendment, this Court places it among the core negative liberties that operate against state power. As this case demonstrates, a state can act to aggrandize its power at the expense of the Constitution. A clear, objective test is the best protection for our liberty.

There are strong prudential reasons for confirming the jurisprudence of territorial jurisdiction set forth by Justice O'Connor in her concurring opinion. First, while no other court has gone as far as the court below and discarded the entirety of this Court's jurisprudence in this area, other courts have come perilously close, interpreting the language of Justice Brennan's concurring opinion of actual awareness as allowing jurisdiction to attach upon a finding of only constructive awareness. This experience suggests that Justice Brennan's departure from this Court's jurisprudence is particularly subject to abuse by the lower courts.

Second, rejecting a rule that finds mere awareness, actual or constructive, sufficient for jurisdiction may give assurance to other countries and their courts that the state courts will be more restrained than has heretofore been sometimes the case, and re-affirm this Court's commitment to the "[g]reat care and reserve" embraced in *Asahi*. *See* Parrish, *supra*, at 45-53. Third, and in aid of several of the above reasons, Justice O'Connor's analysis avoids the problem of leaving the determination of our liberty with a subjective judge-by-judge assessment of what is fair and just. *See Burnham*, 495 U.S. at 622-623 (Scalia, J., concurring).

A. Engagement By Action, Not Simply Awareness of Another's Acts

At the outset of her plurality opinion in *Asahi*, Justice O'Connor sets forth the formulations that this Court has used in describing what a nonresident must do before that person can lawfully be haled into a state court: "defendant purposefully established minimum contacts in the forum state;" "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State;" "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Asahi*, 480 U.S. at 108-09 (O'Connor, J., concurring). Common to these formulations is that a defendant must intentionally act and direct that action at, and sufficiently in, the very state that seeks to exercise power over that person.

This Court's unvarying adoption of language of purposeful action by the nonresident defendant as a requisite for long-arm jurisdiction, led Justice O'Connor to state that "[t]he 'substantial connection'" of *Burger King*, 471 U.S. at 475, between the defendant and the forum state necessary for a finding of minimum contacts "must come about by *an action of the defendant purposefully directed toward the forum State.*" *Asahi*, 480 U.S. at 112 (O'Connor, J. concurring). Justice O'Connor supplied the emphasis.

As a corollary to her analysis, Justice O'Connor rejected as inconsistent with this Court's jurisprudence that mere awareness by a defendant that "the stream of commerce may or will sweep the product into the forum State" permits the state to exercise judicial power over the defendant. *Id.*

In his opinion, Justice Brennan employed far more sparingly the language of purposeful availment and purposeful engagement in forum activities. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment). He found mere awareness sufficient to cause jurisdiction to attach (although it was a specific awareness that the product was being sold into the forum state, an element of proof not present in the instant case). *Id.* at 121.

Justice Brennan's sparse use of this Court's precedents defining jurisdictional limits is an indication that his own suggested rule was a departure. Indeed, an analysis of his opinion demonstrates that it constituted a complete break with this Court's jurisprudence. While this Court required that the

putative defendant itself intentionally act at, in, or toward the forum state, Justice Brennan would have it sufficient that another act and the putative defendant be simply aware of the action. That separation of actor and defendant was nowhere sanctioned by any prior opinion of this Court. It appears but once, and that is in Justice Brennan's concurrence.

Justice Brennan's concurrence does not respect the plain meaning of the terms employed by this Court. Purposeful availment does not mean passive awareness. As the Michigan Court of Appeals aptly described in *Vargas v. Hoing Jin Crown Corp.*, 247 Mich.App. 278, 284-85, 636 N.W.2d 291, 296 (Mich. Ct. App. 2001), "purposeful availment" means "something akin either to a deliberate undertaking to do or cause an act or thing to be done in" the forum state "or conduct which can be properly regarded as a prime generating cause of the effects resulting in" the forum state. It must be something more than a *passive* availment of forum state opportunities. The Michigan courts have thoughtfully applied this Court's jurisprudence in the realm of personal jurisdiction, giving to this Court's language a plain, logical, and persuasive reading. "[B]enefit[ing] economically from the sale" in the forum state, sufficient (with knowledge thereof) for Justice Brennan, *Asahi*, 480 U.S. at 121 (Brennan, J., concurring in part and concurring in the judgment), fits squarely within what the Michigan courts identify as passive availment of state opportunities, and squarely outside the constitutional limits of state exercise of jurisdiction over nonresident putative defendants.

B. Conforming, Not Guessing

As discussed in Section II.C., *supra*, the essential due process considerations of this Court's jurisprudence are expressed through the right of a person to have adequate notice of those acts which will cause the person to be subject to a state's jurisdiction. Through purposeful availment a producer will have a fair opportunity to conform its conduct so as to avoid state power if the producer chooses. To predicate jurisdiction on anything less leads to a rule where "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *World-Wide Volkswagen*, 444 U.S. at 296. A rule that allows for jurisdiction to be predicated upon the behavior of another party is not consonant with the predictability that is key to meaningful due process. To subject defendants to judgment in locations based on the activity of third persons and not their own deliberate conduct, renders it "impossible for defendants to plan and structure their business contacts and risks." *Lesnick*, 35 F.3d at 945.

The formulation of the jurisprudence by Justice O'Connor is consistent with the fair notice component of the rule and Justice Brennan's is not. Justice O'Connor's concurrence includes the protection whereby a producer is informed that if the producer does something directed at a state, the producer may wind up in its court. Justice Brennan informs a producer that a mere state of mind, however later determined by a court, may (or may not, if unreasonable or unfair) result in jurisdiction. Justice Brennan posits a test that is fundamentally unfair because of its imprecision and the degree of discretion allowed thereby to courts.

Justice Brennan's test is inconsistent with reasonable certainty, and violates the fair notice foundations of due process required by this Court in a state's exercise of long-arm jurisdiction under the Constitution.

C. An Invitation to Excess

Justice Brennan's test invites abuse by lower courts. While Justice Brennan's opinion requires a defendant's actual awareness of sales into the forum state, *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment), courts have, in several cases, found it tempting to move from actual to constructive knowledge, from knowing to "should have known," a temptation they were unable to resist.

In *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613 n. 4 (8th Cir. 1994), the Eighth Circuit extended the Justice Brennan test to make the unwarranted leap from finding that a foreign fireworks manufacturer supplied fireworks to a regional distributor, which in turn sold substantial quantities of the products into South Dakota, to a finding that the manufacturer should have "known" that its products could make their way into South Dakota, despite the absence of purposeful connection by the manufacturer with South Dakota.

In *A. Uberti C. v. Leonardo*, 181 Ariz. 565, 574, 892 P.2d 1354, 1363 (1995), the Arizona Supreme Court, claiming to rely on Justice Brennan's approach, found jurisdiction over a foreign gun manufacturer having no actual knowledge that its products, sold in high volume

through a single distributor throughout the United States, had come into Arizona. Citing *Barone*, the court imputed to the defendant a constructive knowledge of the efforts of its distributors.

In *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 660, 425 S.E.2d 609, 615 (1992), also claiming to rely on Justice Brennan's approach in *Asahi*, the Supreme Court of Appeals of West Virginia found that because the defendant had "benefited from" the high sales of its products that made their way into the state via the efforts of a wholly-owned distributor, the court presumed control of those efforts, and constructed awareness of them.

Taking the opportunity afforded by Justice Brennan's test to impermissibly expand the exercise of jurisdiction, these courts failed to observe the constitutional limits imposed by this Court on long-arm jurisdiction. Perhaps these courts were animated by the potentially hazardous nature of the products that were the subject matters of the litigations. That is not, however, a relevant factor for the exercise of jurisdiction. The apparent susceptibility of Justice Brennan's test to be misused to eliminate completely any thought of a state from the requirements for exercise of long-arm jurisdiction by that state, suggests that Justice Brennan's test does not easily lend itself to successful application in the everyday world of lower court decision-making.

D. "Great Care and Reserve" in Exercise of Jurisdiction Over Persons in Other Countries

Following the principles laid down by Justice O'Connor's concurring plurality opinion will result in the proper application of the Constitution to determine whether foreign putative defendants can be haled into state courts in this country. No longer will merely thinking about a state or being presumed to think about a state be sufficient to be dragged into that state's courts from, literally, half a world away.

By responding to the audacious action of the New Jersey Supreme Court in discarding all that this Court has established over the decades, and re-affirming the principles established thereby by adopting Justice O'Connor's re-statement of those principles, this Court will also re-affirm the paramount value of "great care and reserve" in the exercise of personal jurisdiction in the international sphere.

E. Siting Fair Play and Substantial Justice in a Rule of Law, Not in the Subjective Appreciation of Members of the Judiciary

The very first sentence of Justice O'Connor's concurring opinion in *Asahi* defines the stakes of that case, this case, and all others where long-arm jurisdiction is being claimed: "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant." 480 U.S. at 108. While the caption may read plaintiff against putative defendant, the Constitution sees the state against a person, and

necessarily seeks to protect the latter's liberty interest. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n. 10 (1982).

The right to be free from the unlawful exercise of state power is too important to be left to each American jurist's "subjective assessment of what is fair and just." *Burnham*, 495 U.S. at 623 (Scalia, J., concurring). Justice O'Connor's concurring opinion gives further definition "to jurisdictional rules that are generally applied and have always been applied in the United States." *Id.* State courts can adhere to those rules and find a result that adheres to the notions of due process that have guided this Court in its formulation of jurisdictional jurisprudence. Those courts need search no farther for guidance.

Justice Brennan, on the other hand, concluded that minimum contacts existed with California, but then joined Part II-B of the opinion of this Court delivered by Justice O'Connor, which concluded that personal jurisdiction over Asahi "would be unreasonable and unfair." *Asahi*, 480 U.S. at 116. This was dictum for the Justices who joined in Justice O'Connor's concurrence and who joined in Part II-B of *Asahi*, because those Justices had concluded there were no minimum contacts.

It is, rather, unreasonable and unfair for judges to be allowed a savings power over a determination of jurisdiction. No "equitable bargain," *Burnham*, 495 U.S. at 624 (Scalia, J., concurring), need be struck to grant or deny jurisdiction as long as the rule itself is properly fashioned by this Court to protect the right of persons not to be dragged into state courts in violation of the

Due Process Clause of the Fourteenth Amendment. The application of the principles set down by Justice O'Connor achieves justice and removes subjectivity.

CONCLUSION

This Court has not abandoned the principles embodied in its personal jurisdiction jurisprudence in the face of economic developments. Technologies may come and go, but the liberty we are guaranteed under the Due Process Clause is not extinguished in the name of progress. Nor are state lines; and just as each state is allowed to establish its laws and procedures within its borders, it is not free to seek out new territories to apply them, either in or out of this country.

Our rights are secured by the application of settled principles of territorial jurisdiction. The choice between fairness and federalism is a false dichotomy: territoriality achieves both, protecting the liberty of the Due Process Clause, while insuring that the legitimate interests of the states of our country are given due sway. And not least, the application of the *in personam* jurisdiction jurisprudence as established by this Court will serve to insulate the operation of our foreign affairs by the federal sovereign from the actions of state courts.

For the foregoing reasons, Petitioner J. McIntyre Machinery, Ltd. respectfully requests that this Court reverse the decision of the Supreme Court of New Jersey.

Respectfully submitted,

STEVEN F. GOOBY
ROBERT A. ASSUNCAO
JAMES S. COONS
ANSA ASSUNCAO, LLP
Two Tower Center Blvd.
Suite 1600
East Brunswick, NJ 08816
(732) 993-9850

ARTHUR F. FERGENSON
Counsel of Record
ANSA ASSUNCAO, LLP
3545 Ellicott Mills Drive
Ellicott City, MD 21043
(410) 203-1247
arthur.fergenson@ansalaw.com

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Attorneys for Petitioner